A **GLENEAGLES HOSPITAL (KL) SDN BHD**

v.

CHUNG CHU YIN & ORS AND ANOTHER APPEAL

B COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
ROHANA YUSUF JCA
TENGKU MAIMUN JCA
[CIVIL APPEALS NO: W-02-2661-10-2011 &
C W-02-2662-10-2011]
24 JUNE 2013

TORT: *Negligence - Medical negligence - Baby delivered in poor condition - Cerebral palsy - Whether injuries to baby caused by negligent*
D *act of doctor and/or hospital - Whether award granted by High Court manifestly excessive - Whether doctor acted appropriately within accepted standards of an obstetrician - Apportionment of liability - Whether raised in statement of defence - Costs for future damages - Whether trial judge took into consideration principle of mitigation - Whether multiplier*
E *wrongly calculated by trial judge - Whether interest awarded in accordance with O. 42 r. 12 Rules of the High Court 1980*

DAMAGES: *Assessment - Medical negligence - Injuries to baby caused by negligent act of doctor and/or hospital - Apportionment of liability -*
F *Costs for future damages - Whether trial judge took into consideration principle of mitigation - Whether multiplier wrongly calculated by trial judge - Interest awarded on special and general damages - Whether in accordance with O. 42 r. 12 Rules of the High Court 1980 - Whether appellate intervention warranted*

G ***CIVIL PROCEDURE:*** *Appeal - Appeal to Court of Appeal - Suit premised on medical negligence - Whether trial judge misdirected herself in failing to apportion liability between doctor and hospital - Whether award granted manifestly excessive - Costs for future damages - Failure to take into consideration principle of mitigation - Whether multiplier*
H *wrongly calculated by trial judge - Whether interest awarded in accordance with O. 42 r. 12 Rules of the High Court 1980 - Whether appellate intervention warranted*

CIVIL PROCEDURE: *Interest - Judgment sum - Interest awarded at*
I *rate of 8% on special and general damages - Whether interest awarded contrary to law - Rules of the High Court 1980, O. 42 r. 12*

The appeals in this matter were filed in relation to a medical negligence case involving the appellants, Gleneagles Hospital (KL) Sdn Bhd ('the hospital') and Dr Jimmy Tang Sek Cheong ('Dr Jimmy'), who runs his practise at the hospital. The suit was initially brought by the first to the third respondents ('plaintiffs') against the appellants. The first plaintiff ('Samantha'), was the child of the second plaintiff and the third plaintiff ('the mother'). On 19 December 2002 at about 8.45am, the mother was admitted to the hospital. Prior to her admission, the second plaintiff had contacted Dr Jimmy's clinic and informed the employee there of the mother's condition and of their arrival. Upon admission, the mother was attended by a midwife employed by the hospital. Between 9.23 to 9.24am, there was a dip in the fetal heart rate. The midwife, without consulting Dr Jimmy, had administered enema and pethidine injection into the mother. Dr Jimmy was not notified of the dip in the fetal heart rate. When Dr Jimmy arrived, he decided to deliver the baby by vacuum but the equipment was faulty and did not function. At 10.28am, Dr Jimmy delivered Samantha by forceps. It was noted that Samantha was delivered in poor condition and at 10.55am, a paediatrician came to attend to her. Samantha suffered from intrapartum asphyxia whereby her condition had been diagnosed as cerebral palsy. Filing a suit in the High Court, the plaintiffs alleged that Samantha's injuries were caused by the negligence of Dr Jimmy and/or the hospital. After the trial, during which time Samantha was almost nine years old, the learned Judicial Commissioner ('JC') found Dr Jimmy and the hospital to be wholly liable to the plaintiffs and no apportionment was made on the liability. The trial court found Samantha's life expectancy to be 49 years and awarded, *inter alia*, (i) general damages for the sum of RM350,000; and (ii) future special damages. Dissatisfied, the appellants appealed to this court. It was submitted, *inter alia*, that (a) the learned JC misdirected herself in failing to apportion liability between Dr Jimmy and the hospital; (b) Dr Jimmy should not have been found liable for negligence; (c) except for the failure to call the paediatrician, the labour management by Dr Jimmy was well within the reasonable standard expected of him; (d) the award granted was manifestly excessive; (e) the multiplier applied by the JC was not appropriate; (f) the learned JC failed to apply the 1/3 rule on the costs of private hospital and to make deductions for contingencies; and (g) the interest rate awarded was contrary to law.

Held (dismissing appeals on liability; varying multiplier for future damages and interest rate accordingly)
Per Tengku Maimun JCA delivering the judgment of the court:

(1) Dr Jimmy was not duty bound to be present when the mother was admitted and neither was there a duty imposed on him to personally monitor the mother or to deliver the baby at 9.42am. This was particularly so when he was not informed of the actual condition of the fetus. Except for the failure by Dr Jimmy to call for the paediatrician, the act of Dr Jimmy was appropriate and the labour management was within the accepted standards of an obstetrician. (para 33)

(2) The statement of defence did not raise issues of apportionment of liability. The extent of Samantha's injury contributed by the delay could not be quantified and it had not been shown that there was any material or evidence before the learned JC which enabled Her Ladyship to make an estimate on the division of both, Dr Jimmy and the hospital's responsibilities. Hence, there was no error on the part of the JC in not apportioning liability between Dr Jimmy and the hospital. (para 38)

(3) An appellate court will not reverse the decision of a trial judge unless it is satisfied that the judge had acted on a wrong principle of law or has made a wholly erroneous estimate of the damages suffered either due to an omission to consider some relevant materials or an admission of some irrelevant considerations. The learned JC did not err in deciding to award RM350,000 for general damages. Her Ladyship had taken into consideration the mental retardation, disabilities and loss of amenities suffered by Samantha. Hence, there was no reason to disturb the award on general damages. (para 39)

(4) As for future damages, it was not in dispute that Samantha needed long term rehabilitation and therapies, other supportive treatment and help of developmental psychologist. The learned JC, however, failed to consider the principle of mitigation in awarding future damages to Samantha. Due to the long waiting list at the government hospital, the plaintiffs may

choose to go to the private hospital if an urgent treatment was required. If treatment at the private hospital was chosen, only one third of the amount claimed would be allowed. Hence, the plaintiffs ought not to have been awarded the full costs of a private hospital. (paras 40 & 42)

(5) When the judgment was delivered at the trial court, Samantha was almost nine years of age. In allowing the awards on the basis of 49 years, the learned JC did not consider Samantha's age at the trial and had, therefore, failed to establish that the correct multiplier for future loss should be 40 years and the total amount allowed was reduced by 30%. (paras 44, 45 & 49)

(6) As provided under s. 11 of the Civil Law Act 1956, interest is awarded based on the discretion of the trial judge. The discretion, however, must be exercised judiciously in accordance with the rules. Order 42 r. 12 of the Rules of the High Court 1980 provides that every judgment sum shall carry interest at the rate of 4% per annum or at such other rate not exceeding the rate aforesaid as the court directs, such interest to be calculated from the date of judgment until the judgment is satisfied. Judgment in this case was given on 30 September 2011. Hence, the interest rate applicable for the period from the date of judgment until realisation should be 4%. Hence, the learned JC had erred in law for awarding interest at the rate of 8% on special damages from the date of judgment until full settlement. Similarly, the interest rate of 8% per annum on the general damages from the date of service of the writ until full settlement was not in accordance with O. 42 r. 12. (para 47)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan-rayuan di sini adalah berkaitan dengan kes kecuaian perubatan yang melibatkan perayu-perayu, Gleneagles Hospital (KL) Sdn Bhd ('hospital itu') dan Dr Jimmy Tang Sek Cheong ('Dr Jimmy'), yang beramal di hospital itu. Tindakan ini telah pada mulanya dibawa oleh responden-responden pertama hingga ketiga ('plaintif-plaintif') terhadap perayu-perayu. Plaintif pertama ('Samantha'), merupakan anak kepada plaintif kedua dan plaintif ketiga ('ibu Samantha'). Pada 19 Disember 2002, kira-kira pukul 8.45 pagi, ibu Samantha dimasukkan ke hospital itu. Sebelum kemasukannya, plaintif kedua telah menghubungi klinik Dr Jimmy

dan memaklumkan pekerja di situ berkenaan keadaan ibu Samantha dan ketibaan mereka ke hospital itu. Setelah dimasukkan, ibu Samantha telah dihadiri oleh seorang bidan yang bekerja di hospital itu. Di antara pukul 9.23 hingga 9.24 pagi, terdapat penurunan dalam kadar jantung janin. Bidan, tanpa merujuk kepada Dr Jimmy, telah memberi enema dan suntikan pethidine kepada ibu Samantha. Dr Jimmy tidak dimaklumkan berkenaan penurunan kadar jantung janin. Apabila Dr Jimmy tiba, beliau bercadang untuk melahirkan bayi itu melalui kaedah vakum tetapi peralatan itu rosak dan tidak berfungsi. Pada pukul 10.28 pagi, Dr Jimmy telah melahirkan Samantha melalui kaedah forseps. Samantha dilahirkan dalam keadaan tidak begitu baik dan pada pukul 10.55 pagi, seorang pakar pediatrik telah datang untuk memeriksanya. Samantha telah mengalami "intrapartum asphyxia" di mana keadaannya telah dikenalpasti sebagai "cerebral palsy". Dengan memfailkan tindakan di Mahkamah Tinggi, pihak plaintif menghujah bahawa kecederaan-kecederaan yang dialami oleh Samantha adalah disebabkan oleh kecuaian Dr Jimmy dan/atau hospital itu. Selepas perbicaraan, di mana pada masa itu Samantha berumur hampir sembilan tahun, yang arif Pesuruhjaya Kehakiman ('PK') mendapati bahawa Dr Jimmy dan hospital itu bertanggungjawab sepenuhnya terhadap plaintif-plaintif dan tiada pengagihan liabiliti dibuat. Mahkamah perbicaraan mendapati bahawa jangka hayat Samantha adalah 49 tahun dan mengawardkan, antara lain, (i) ganti rugi am sebanyak RM350,000; dan (ii) ganti rugi khas masa depan. Tidak puas hati, perayu-perayu merayu ke mahkamah ini. Adalah dihujahkan, antara lain, bahawa (a) yang arif PK tersalah arah kerana gagal mengagihkan liabiliti di antara Dr Jimmy dan hospital itu; (b) Dr Jimmy tidak sepatutnya didapati bersalah untuk kecuaian; (c) kecuali kegagalan untuk memanggil pakar pediatrik, pengurusan kelahiran oleh Dr Jimmy adalah baik mengikut standard munasabah yang diharapkan daripada beliau; (d) award yang diberikan adalah nyata berlebihan; (e) pendarab yang dipakai oleh PK adalah tidak berpatutan; (f) PK gagal memakai kaedah 1/3 terhadap kos hospital swasta dan untuk membuat potongan bagi kontingensi; dan (g) kadar faedah yang diawardkan adalah bertentangan dengan undang-undang.

Diputuskan (menolak rayuan-rayuan terhadap liabiliti; mengubah pendarab bagi ganti rugi masa depan dan kadar faedah)

Oleh Tengku Maimun HMR menyampaikan penghakiman mahkamah:

(1) Dr Jimmy tidak berkewajipan untuk hadir apabila ibu Samantha telah dimasukkan ke hospital dan beliau juga tidak mempunyai kewajipan untuk mangawasi ibu Samantha atau melahirkan bayi pada pukul 9.42 pagi. Ini terutama sekali apabila beliau tidak dimaklumkan mengenai keadaan sebenar janin. Kecuali bagi kegagalan Dr Jimmy untuk memanggil pakar pediatrik, tindakan Dr Jimmy adalah wajar dan pengurusan kelahiran adalah dalam standard yang boleh diterima bagi seorang obstetrik.

(2) Pernyataan pembelaan tidak membangkitkan isu-isu pengagihan liabiliti. Tahap kecederaan Samantha yang disumbangkan oleh kelewatan tidak boleh dinilai dan ia tidak dibuktikan bahawa terdapat apa-apa keterangan supaya yang arif PK boleh membuat anggaran terhadap tanggungjawab Dr Jimmy dan hospital itu. Dengan itu, PK tidak khilaf kerana gagal mengagihkan liabiliti di antara Dr Jimmy dan hospital itu.

(3) Mahkamah rayuan tidak akan mengakaskan keputusan hakim perbicaraan melainkan jika ia berpuas hati bahawa hakim telah bertindak atas prinsip undang-undang yang salah atau telah membuat anggaran yang salah terhadap kerosakan yang dialami, sama ada disebabkan oleh kegagalan untuk mempertimbangkan perkara-perkara relevan atau menerima pertimbangan yang tidak relevan. Yang arif PK tidak khilaf dalam memutuskan award sebanyak RM350,000 bagi ganti rugi am. PK telah mengambil kira faktor-faktor seperti kecacatan akal, kurang upaya dan kehilangan kemudahan yang dialami oleh Samantha. Oleh itu, tidak ada sebab untuk mengganggu award bagi ganti rugi am.

(4) Bagi kerosakan masa depan, ia tidak dipertikaikan bahawa Samantha memerlukan pemulihan jangka panjang dan terapi, rawatan sokongan lain dan bantuan psikologi. Yang arif PK, walau bagaimanapun, gagal mempertimbangkan prinsip pengurangan dalam mengawardkan ganti rugi masa depan Samantha. Disebabkan senarai tunggu lama di hospital kerajaan, plaintif-plantif boleh memilih untuk pergi ke hospital swasta jika rawatan segera diperlukan. Jika rawatan di hospital

A swasta dipilih, hanya satu pertiga daripada jumlah yang dituntut akan dibenarkan. Oleh itu, plaintif tidak sepatutnya diawardkan kos penuh bagi hospital swasta.

(5) Apabila penghakiman disampaikan di mahkamah perbicaraan, Samantha hampir berumur sembilan tahun. Dalam membenarkan award atas dasar 49 tahun, yang arif PK tidak mempertimbangkan umur Samantha semasa perbicaraan dan oleh itu, telah gagal membuktikan bahawa pendarab yang betul untuk kehilangan masa depan sepatutnya adalah 40 tahun dan jumlah yang dibenarkan telah dikurangkan sebanyak 30%.

(6) Seperti yang diperuntukkan di bawah s. 11 Akta Undang-Undang Sivil 1956, faedah yang diawardkan adalah berdasarkan budi bicara hakim perbicaraan. Budi bicara tersebut, walau bagaimanapun, mesti dilaksanakan secara penuh kehakiman mengikut peraturan-peraturan. Aturan 42 k. 12 Kaedah-Kaedah Mahkamah Tinggi 1980 memperuntukkan bahawa setiap jumlah penghakiman mempunyai faedah pada kadar 4% setahun atau pada kadar lain yang tidak melebihi kadar yang dinyatakan sebagaimana diarahkan oleh mahkamah, faedah sebegitu hendaklah dikira dari tarikh penghakiman sehingga penghakiman itu ditunaikan. Penghakiman dalam kes ini telah diberikan pada 30 September 2011. Oleh itu, kadar faedah yang digunapakai bagi tempoh dari tarikh penghakiman sehingga penyelesaian adalah 4%. Oleh itu, yang arif PK terkhilaf dari segi undang-undang dalam mengawardkan faedah pada kadar 8% ke atas ganti rugi khas dari tarikh penghakiman sehingga penyelesaian penuh. Begitu juga, kadar faedah sebanyak 8% setahun ke atas ganti rugi am dari tarikh penyampaian writ sehingga penyelesaian penuh adalah tidak mematuhi kehendak A. 42 k. 12.

Case(s) referred to:

Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118 ***(foll)***

Chai Yee Chong v. Lew Thai [2004] 2 CLJ 321 CA ***(refd)***

Dr Quah Thong Sai v. Manonmoney Subramoney & Anor [2012] 4 CLJ 853 HC ***(refd)***

Foo Fio Na v. Dr Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(refd)***

Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***

Thompson v. Smith Ship Repairers (North Shields) Ltd [1984] 1 QB 405 ***(refd)***

Wong Thin Yit v. Mohamed Ali [1971] 1 LNS 151 FC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11
Rules of the High Court 1980, O. 42 r. 12

(Civil Appeal No: W-02-2661-10-2011)
For the appellant - Andrew Khoo (S Murali with him); M/s Khoo & Sidhu
For the 1st, 2nd & 3rd respondents - S Periasamy (M Kumar with him); M/s Maha & Peri
For the 4th respondent - Johanan A Puthucheary (Dominic J Puthucheary, Shanti Abraham & Sharon Palani with him); M/s Puthucheary

(Civil Appeal No: W-02-2662-10-2011)
For the appellant - Johanan A Puthucheary (Dominic J Puthucheary, Shanti Abraham & Sharon Palani with him); M/s Puthucheary
For the 1st, 2nd & 3rd respondents - S Periasamy (M Kumar with him); M/s Maha & Peri
For the 4th respondent - Andrew Khoo (S Murali with him); M/s Khoo & Sidhu

[Appeal from High Court, Kuala Lumpur; Civil Suits No: S4-22-1413-2005 & S1-22-1413-2005]

Reported by Kumitha Abd Majid

JUDGMENT

Tengku Maimun JCA:

[1] There are two appeals before us which were heard together. The appeals arose from the decision of the High Court at Kuala Lumpur in a medical negligence case. The first appeal No. W-02-2661-10-2011 was filed by Gleneagles Hospital (KL) Sdn Bhd (the hospital) and the second appeal No. W-02-2662-10-2011 was filed by Dr Jimmy Tang. Dr Jimmy Tang and the hospital were the first and the second defendants respectively in the High Court. The first to the third respondents in both the appeals were the plaintiffs.

[2] The first plaintiff, who will be referred to as the baby/Samantha, is the child of the second plaintiff and the third plaintiff. The third plaintiff (the mother) had her antenatal check-ups and treatment with Dr Jimmy Tang who runs his practice at the hospital.

[3] On 19 December 2002 at about 8.45am, the mother was admitted to the hospital. Prior to the admission, ie, on the way to the hospital, the second plaintiff had contacted Dr Jimmy Tang's clinic and had informed the employee, of the mother's condition and of their arrival. Upon admission, the mother was attended to by a midwife employed by the hospital. The CTG tracing at 9.20am shows that the baby's heart rate was normal. Dr Jimmy Tang was informed by the midwife at about 9.20am that labour was progressing well.

[4] Between 9.23-9.24am, there was dip in the fetal heart rate. Dr Jimmy Tang was not alerted of the dip. Enema was administered to the mother by the midwife without consulting Dr Jimmy Tang. The mother went to the toilet and CTG monitoring was halted and was not reattached until later. At 10am the mother requested for sedation. The midwife administered pethidine injection, again without consulting Dr Jimmy Tang. At this point of time, Dr Jimmy Tang was still not notified of the dip in the fetal heart rate.

[5] Dr Jimmy Tang was called at 10.05am when there was a case of fetal bradycardia. Dr Jimmy Tang arrived at 10.08am in a situation of emergency. He immediately did the artificial rupture of the membrane. He noted the liquor (the water surrounding the uterus) was stained with meconium (faeces). The mother was not able to push due to the sedation given by the midwife. Dr Jimmy Tang decided to deliver the baby by vacuum but the equipment was faulty and did not function. He requested for another vacuum from the hospital but it was not available. Dr Jimmy Tang delivered Samantha by forceps at 10.28am.

[6] Samantha was delivered in poor condition with an Apgar score of 4/4. She came out not breathing, no heart rate and blue. Dr Jimmy Tang handed Samantha to the midwife and continued to attend to the mother, delivering the placenta and attending to the bleeding. The midwives/nurse attempted to resuscitate Samantha. Samantha had pneumothorax due to an inappropriate intubation by a nurse. After the midwives/nurse failed to resuscitate Samantha, a code pink was raised. Responding to the code pink, a paediatrician came to attend to Samantha at 10.55am. Resuscitation was not effective and Samantha remained in coma for the next three days and she was ventilated for eight days. She was discharged 16 days after birth. Samantha suffered from intrapartum asphyxia. Her condition has been diagnosed as cerebral palsy, ie, asymmetrical dystonic-spastic diplegia.

[7] The plaintiffs contended that Samantha's injuries were caused by the negligence of Dr Jimmy Tang and/or the hospital. As against Dr Jimmy Tang, the particulars of negligence pleaded by the plaintiffs are:

(i) had failed to attend to the mother promptly although he had been informed through his staff of the mother's condition and imminent arrival;

(ii) had failed to exercise reasonable skill in the care and management expected of him before and after delivery and had breached the duty and standard of care owed by him;

(iii) had failed to ensure that the medical equipment that was required was in proper working order and that there were adequate medical equipments and/or replacements available for use;

(iv) had failed to recognise the threat of excessive vacuum use and improper use of forceps;

(v) had failed to notice and to recognise the changes in the fetal heart rate and perform a caesarean section;

(vi) had failed to take any preventive or curative measures to arrest the deterioration of the condition of the mother and Samantha; and

(vii) had failed to call a paediatrician and a neonatologist to be present during the delivery and to attend to the baby immediately upon delivery.

[8] As against the hospital, the plaintiff pleaded the following particulars of negligence:

(i) had failed to exercise proper care and management and provide full paediatric neonatal facilities and services and competent staff expected of the hospital;

(ii) had failed to ensure that the required and necessary medical equipment including the vacuum extractor was available and in proper working order;

(iii) had failed to ensure that there were adequate replacement equipment including the vacuum extractor available for use and provide or make available another vacuum extractor which could function;

A (iv) had failed to ensure that competent clinical staff were present to attend to the mother;

(v) had caused or permitted to be caused undue delay in attending to the mother; and

B (vi) had failed to ensure the presence of a paediatrician and neonatologist to attend to the baby immediately upon delivery.

In The High Court

C **[9]** Several witnesses testified for both the plaintiffs and the defendants. The expert witness for the plaintiffs was Dr Raman Subramaniam, an obstetrician (SP3).

[10] SP3 and Puan Dasimah binti Ahmad, a midwife and the
D Secretary of Lembaga Jururawat dan Bidan Malaysia (SD8) confirmed that the midwife was obliged to notify Dr Jimmy Tang of any dip in fetal heart rate and that it was wrong to disregard the same without checking with the doctor first. SP3 states that the consequences of fetal bradycardia if no treatment is
E administered would be hypoxia (where the blood flow to the important organs namely brain, heart, kidney, to some extent the liver and the intestines is preserved while the blood flow to the extremities like the hands and the legs are shut down) followed by asphyxia (where the blood flow to the vital organs are diminished). At the state of asphyxia, the baby can die in the womb or born
F in poor condition, like in this case (pp. 1127-1130 Core Bundle 2/7; p. 906 of Core Bundle 7/7).

[11] As for pethidine, the evidence of SP3 is that it is an accepted pain relief medication but not when the heart rate is
G dropped. The effect of pethidine which was administered to the mother at 10am was that the mother was groggy at delivery. She could not push and further, in 28 minutes it took to deliver the baby, it transfers to the baby and sedates the baby as well causing difficulty in breathing. Hence according to SP3, the
H administration of pethidine at that stage was not a proper treatment or protocol for treatment. It was the evidence of SP3 that the accepted practice is for the doctor himself to administer or to order the administration of pethidine.

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[12] In his report (exh. P3) SP3 states that both the initial management of the mother in the labour ward and following delivery are not in line with standard management and that early intervention in both these areas could have prevented the present condition of Samantha. According to SP3, Dr Jimmy Tang should have notified the paediatrician. It was the opinion of SP3 that except for not having a paediatrician to resuscitate the baby at birth, Dr Jimmy Tang's labour management was appropriate. His evidence was that if Samantha had been delivered earlier and there was proper resuscitation by a paediatrician, it would have made a major difference in the outcome.

[13] Professor Lim Chin Theam, a paediatrician (SD1) confirms the opinion of SP3 that with effective resuscitation, the apgar score should improve (pp. 1437-1439 Core Bundle 2/7).

[14] Dr Jimmy Tang (SD11) conceded that he should have called for a paediatrician but he did not.

[15] After the trial, during which time Samantha was eight years and nine months old, the learned Judicial Commissioner found Dr Jimmy Tang and the hospital wholly liable to the plaintiffs. No apportionment was made on liability.

[16] Applying the principles in *Foo Fio Na v. Dr Soo Fook Mun & Anor* [2007] 1 CLJ 229, the learned Judicial Commissioner found both Dr Jimmy Tang and the hospital negligent on the following grounds:

(i) Both the defendants failed to take appropriate action during and after the birth of Samantha.

(ii) The attempts by the hospital's employees to resuscitate Samantha were insufficient and there was no paediatrician present at the time of birth who could have carried out the resuscitation.

(iii) The vacuum pump used by Dr Jimmy Tang was faulty.

(iv) The delay by the defendants led to the injury to Samantha.

(v) The hospital was vicariously liable for the negligence of Dr Jimmy Tang.

[17] As against Dr Jimmy Tang, the learned Judicial Commissioner found him liable on the following counts:

(i) he should have been there from the time the mother was admitted;

(ii) he should have delivered the baby at 9.42am;

(iii) he was late;

(iv) the vacuum was not functioning properly;

(v) he did not call a paediatrician when he should have; and

(vi) he did not resuscitate the baby himself.

[18] The learned Judicial Commissioner made a finding that Samantha's life expectancy was 49 years. An amount of RM350,000 was awarded for general damages and the following awards were allowed for future special damages:

(i)	outpatient and surgical consultation for 49 years	RM36,750
(ii)	inpatient medical care for epileptics	RM12,500
(iii)	botox injections for 49 years	RM784,000
(iv)	surgery for joint contractures	RM7,000
(v)	E.E.G	RM12,500
(vi)	MRI	RM62,500
(vii)	cost of medication for epilepsy	RM116,252.50
(viii)	Physiotherapy for 49 years	RM1,587,600
(ix)	Cost and expense of 4 sessions of speech therapy for 49 years	RM235,200
(x)	Motorised bed (5 units)	RM42,500
(xi)	Handgrips, writing aids, universal grips for 49 years	RM17,150
(xii)	Environment manipulation (home modification)	RM12,500

(xiii)	Schooling for remedial teaching for 9 years	RM54,000
(xiv)	Occupational therapy (RM90 per day x 15 years)	RM486,000
(xv)	2 full time care giver/domestic help (RM400 per month for 49 years)	RM674,000
(xvi)	Wheel chair (RM20,000 per unit for 10 units over 49 years)	RM205,000
(xvii)	Maintenance for wheel chair (RM1000 per year for 49 years)	RM49,000
(xviii)	Ankle foot orthosis (RM600 per year for 13 years)	RM7,800
(xix)	Bath chair	RM600
(xx)	Disposal diapers (RM5500 per year for 49 years)	RM269,500
(xxi)	Cost of holiday for Samantha and at least one accompanying person (RM2000 per year for 49 years)	RM65,000

In The Court Of Appeal

[19] In the course of the hearing, it was made clear to us that *Bolam*'s test applies to the present case. In *Bolam v. Friern Hospital Managment Committee* [1957] 2 All ER 118 negligence has been explained as "some failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then that is a cause of action".

[20] It was submitted by learned counsel for Dr Jimmy Tang that the learned trial judge had misdirected herself on the factual matrix of the case in finding Dr Jimmy Tang liable to the plaintiff and in failing to apportion liability between Dr Jimmy Tang and the hospital (if any). It was submitted for Dr Jimmy Tang that having regard to the chronological events, Dr Jimmy Tang should not

have been found liable for negligence. Dr Jimmy Tang had inherited an emergency situation which had occurred when there was a dip in the fetal heart rate and which the midwives chose to ignore and to not inform him about it and that when he arrived, he has done what is expected of him in the circumstances of the case. It was argued that it is an acceptable practice for Dr Jimmy Tang to rely on the midwives who are trained under the Midwives Act 1966 to handle women in labour.

[21] It was thus submitted for Dr Jimmy Tang that based on the evidence of SP3 who had found that except for the failure to call the paediatrician, the labour management by Dr Jimmy Tang was well within the reasonable standard expected of him, Dr Jimmy Tang should be exonerated from any blame.

[22] It was further argued that although Dr Jimmy Tang failed to call a paediatrician, there was no evidence led by the plaintiffs to establish the link between the presence of a paediatrician and cerebral palsy. The evidence merely shows that the presence of a paediatrician would have mitigated the situation but it could not have reversed the damage that had already been done to Samantha *intra partum*. Thus, the omission of Dr Jimmy Tang to call for a paediatrician cannot be the substantial cause of the cerebral palsy. If at all, it was submitted, the doctor's liability is not more than 10% and the learned Judicial Commissioner erred in failing to apportion liability between Dr Jimmy Tang and the hospital. The following cases were cited to support the argument that the court is duty bound to apportion liability between multiple tortfeasors: *Wong Thin Yit v. Mohamed Ali* [1971] 1 LNS 151; [1971] 2 MLJ 175; *Dr Quah Thong Sai v. Manonmoney Subramoney & Anor* [2012] 4 CLJ 853; *Thompson v. Smith Ship Repairers (North Shields) Ltd* [1984] 1 QB 405.

[23] Learned counsel for the hospital conceded that there was some element of negligence on the part of their servants or agents prior to Dr Jimmy Tang's arrival and with regard to the insufficient attempts to resuscitate Samantha immediately after her birth. However it was argued that Dr Jimmy Tang was equally negligent for not arranging for a paediatrician to resuscitate Samantha at birth. It was thus submitted for the hospital that the learned Judicial Commissioner was correct in finding Dr Jimmy Tang negligent but erred both in law and in fact in failing to hold that

Dr Jimmy Tang was at least 50% to be blamed for failing to ensure the presence of a paediatrician or for failing to carry out the resuscitation himself.

[24] On quantum, the grounds of appeal are that the award is manifestly excessive; the multiplier applied by the learned Judicial Commissioner was not appropriate and that the learned Judicial Commissioner failed to apply the 1/3 rule on the private hospital costs and to make deductions for contingencies and accelerated payment. The interest rate awarded by the learned Judicial Commissioner was also challenged as being contrary to law.

[25] The submission for the plaintiffs is that the plaintiffs' action is against both the doctor and the hospital individually and collectively. Dr Jimmy Tang's negligence does not consist only of not calling the paediatrician or non resuscitation but the plaintiffs contended that Dr Jimmy Tang was negligent from the time he failed to attend to the mother upon her admission and in failing to monitor her in the labour ward. Learned counsel for the plaintiffs submitted that the learned trial judge had made a proper decision on the liability of Dr Jimmy Tang and the hospital and that this is not a suitable case for appellate intervention.

[26] As for quantum, learned counsel for the plaintiffs submitted that the damages awarded by the learned Judicial Commissioner was a fair and reasonable amount and ought to be maintained.

[27] The issue before us is whether the learned Judicial Commissioner had erred in coming to the conclusion that Dr Jimmy Tang was negligent; in not apportioning liability and in making the awards that Her Ladyship did.

[28] We are mindful of the fact that the finding of negligence made by the learned Judicial Commissioner is a finding of fact and that the appellate court would not readily interfere in a finding of fact made by a trial court unless the finding is erroneous and is contrary to the evidence or where there is a failure of judicial appreciation of the facts or the law or that the error is so manifest that it had caused injustice to the appellant which warrants appellate intervention.

[29] Among the grounds relied on by the learned Judicial Commissioner in finding Dr Jimmy Tang negligent are that Dr Jimmy Tang failed to be at the ward when the mother was admitted; Dr Jimmy Tang arrived late to deliver Samantha and he did not call for a paediatrician.

[30] It is an undisputed fact that when the mother was admitted to the ward, Dr Jimmy Tang was not there to attend to her and that she was attended to by the midwife, the employee of the hospital. It is also not in dispute that a CTG tracing was done and at about 9.24am Dr Jimmy Tang was informed that the labour was progressing well. The mother was until 10.08am under the care of the nurses/midwives and Dr Jimmy Tang was not informed of the dip in the fetal heart rate or of the administration of edema and pethidine by the nurses.

[31] Applying *Bolam*'s test the question which we now ask is: what is the accepted practice on the conduct of an obstetrician in the circumstances of this case, ie, where he was informed that labour was progressing well and where he was not notified of the fetal distress?

[32] The evidence of the witnesses, in particular, SP3 and SD8 show that it is the accepted practice for the midwives to:

(i) carry out examinations necessary for the monitoring of maternal and fetal well being and the progress of pregnancy;

(ii) recognise risk factors in a pregnant woman and refer promptly for further management;

(iii) care for and assist the mother during labour; and

(iv) monitor the condition of the fetus in utero by acceptable clinical and technical means according to modern standards.

[33] Based on the above, we are of the view that Dr Jimmy Tang is not duty bound to be present when the mother was admitted and neither was there a duty imposed on Dr Jimmy Tang to personally monitor the mother or to deliver the baby at 9.42am. This is particularly so when he was not informed of the actual condition of the fetus. As stated by SP3, except for the failure by Dr Jimmy Tang to call for the paediatrician, the act of Dr Jimmy Tang was appropriate and the labour management was within the accepted standards of an obstetrician.

[34] The causal link between Dr Jimmy Tang and Samantha's injuries would be the omission of Dr Jimmy Tang to call the paediatrician. The presence of a paediatrician is for the purpose of doing proper resuscitation on the baby. Dr Jimmy Tang's case essentially is that the presence of a paediatrician is immaterial as the injury to Samantha had occurred before she was born. SP3, whose evidence was accepted by the learned Judicial Commissioner on causation, had explained the importance of resuscitation where he states that if resuscitation is done properly, the outcome would have been different.

[35] Learned counsel for Dr Jimmy Tang submitted that SP3 is not qualified to explain as he is not a neonatologist and that the plaintiffs failed to challenge the evidence of Dr Vernon Lee, a paediatrician & neonatologist (SD4) who testified that even if a paediatrician had been present, subsequent events may have mitigated but may not save Samantha from the injury.

[36] We find that not only was there the evidence of SP3 on the importance of resuscitation, but there was also the medical report of SD1, a neonatologist which states (exh. D7; p. 1438 Core Bundle 2/7):

> 2. It is now the standard of practice even locally to have a medical officer experienced in resuscitation of asphyxiated infants or a paediatrician to be present for the delivery of high risks infants, such as low birth weight infants, very preterm infants, infants born with meconium-stained liquor, and infants to be delivered *via* breech and instrumental devices like forceps, vacuum and Caesarean section. This is particularly so when the fetus is in distress like in this case when the fetus was having persistent bradycardia and the chances of newborn needing resuscitation was very high and that it is unacceptable to have only nurses to attend to such an ill infant.
>
> 3. The issue of who should call a medical officer or paediatrician should have been decided from the word go. The hospital or unit should have a policy on this issue pertaining to the delivery of high-risk neonates. In the absence of such a policy, it should be the responsibility of the obstetrician to call a paediatrician or an experienced medical officer to attend to the high deliveries. It is thus unacceptable to have only nurses to attend to such an ill infant.

A

4. No improvement in Apgar Score from 1 minute to five minutes after birth is likely to indicate the ineffective resuscitation and that with effective measures the conditions of the infant should improve.

5. ...

B

6. This infant was in serious danger of brain damage. With the paediatrician in attendance and with effective resuscitation the subsequent condition of the infant would be better. However it is not possible to quantify the extent of the brain damage that was contributed by in-utero hypoxia and that contributed by delay in resuscitation.

C

[37] Given the above, the learned Judicial Commissioner was entitled to find Dr Jimmy Tang negligent for failing to call a paediatrician to be present during the delivery and to attend to
D Samantha immediately after delivery.

[38] The plaintiffs pleaded that Dr Jimmy Tang and/or the hospital was negligent and had caused injuries to Samantha. The statement of defence filed by Dr Jimmy Tang (pp. 224-230 RR Jld
E 2) and the hospital (pp. 237-239 RR Jld 2) deny negligence and deny that the loss and damage suffered by Samantha were caused by them. The statement of defence do not raise issues of apportionment of liability. By SD1's medical report, the extent of Samantha's injury contributed by the delay could not be quantified
F and it has not been shown that there is any material or evidence before the learned Judicial Commissioner which enables Her Ladyship to make an estimate on the division of Dr Jimmy Tang's and the hospital's responsibilities. We therefore find no error on the part of the learned Judicial Commissioner in not apportioning
G liability between Dr Jimmy Tang and the hospital.

Appeal On Quantum

[39] Learned counsel for the appellants submitted that the award for general damages of RM350,000 was manifestly high and out
H of trend with current awards. It is trite that an appellate court will not reverse the decision of a trial judge unless it is satisfied that the judge has acted on a wrong principle of law or has made a wholly erroneous estimate of the damage suffered either due to an omission to consider some relevant materials or an admission of
I some irrelevant considerations (*Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; [1985] 2

MLJ 22). We are not persuaded that the learned Judicial Commissioner erred in coming to this figure. Her Ladyship had taken into consideration the mental retardation, the disabilities and loss of amenities suffered by Samantha. We therefore find no reason to disturb the award on general damages.

[40] As for future damages, it is not in dispute that Samantha needs long term rehabilitation and therapies, other supportive treatment and help of developmental psychologist. Dr Malinee Thambyayah, Child Neurologist and Developmental Paediatrician (SP4) who had examined Samantha a number of times, gave a current condition and prognosis report and the costs of rehabilitation care for Samantha. The costing is obtained from the private hospitals/centres. The learned Judicial Commissioner accepted the costs stated in SP4's report (exh. P12) in awarding future damages in excess of RM4.7 million to Samantha.

[41] SP4 agreed that most of the treatment and medication equipments needed by Samantha are available at the government hospitals. Samantha is registered as an Orang Kurang Upaya (OKU) and is an OKU card holder which entitles her to free treatment at government hospitals. The father (SP2) applied for the card and Samantha had in fact used government health care services. According to SP2, he chose not to go to government hospitals because of the long waiting list and appointment dates. The reason is thus simply one of convenience and not because the treatment required by Samantha is not available at the government hospital or that the treatment provided at the government hospital is grossly inadequate.

[42] The complaint by the appellants is that the learned Judicial Commissioner erred in failing to consider the principle of mitigation. We agree with the appellants that the learned Judicial Commissioner failed to consider the principle of mitigation in awarding future damages to Samantha. While SP4 in her evidence said that there are very few paediatric neurologists in the country and the waiting list in the government hospitals is very long, she further said that there are also very few in the private practice. We accept that due to the long waiting list at the government hospital, the plaintiffs may choose to go to the private hospital if an urgent treatment is required. In accord with the authorities, if the plaintiffs choose treatment at a private hospital, it is a matter of practice that only one third of the amount claimed will be allowed (*Chai Yee Chong*

A *v. Lew Thai* [2004] 2 CLJ 321). Hence, we agree with the appellants that the plaintiffs ought not to have been awarded the full costs of a private hospital.

[43] During the trial, Samantha was about 8 1/2 years old. The
B evidence of SP4 is that Samantha's life expectancy would be greater than 38.8 years. Professor Dr Ong Lai Choo (SD3) states that Samantha is expected to live beyond the age of 40 and from latest estimates, the life expectancy of a 15 year old females in Samantha's category would be 35 additional years.

C

[44] The learned Judicial Commissioner made a finding that Samantha's life expectancy is 49 years of age and had awarded future damages for a period of 49 years. In this regard, the ground of appeal was that the learned Judicial Commissioner erred
D in not taking into account the fact that during the trial and when judgment was delivered, Samantha was almost nine years of age (rounded figure).

[45] Looking at the grounds of judgment, we agree with the appellants that in allowing the awards on the basis of 49 years,
E the learned Judicial Commissioner did not consider Samantha's age at the trial and had therefore failed to establish that the correct multiplier for future loss should be 40 years.

[46] The learned Judicial Commissioner awarded interest on
F special damages at the rate of 4% per annum from 19 December 2002 until the date of judgment and thereafter at 8% per annum until full settlement. For general damages, the interest awarded was at 8% per annum from the date of service of the writ until full settlement. It was submitted for the appellants that the learned
G Judicial Commissioner erred in awarding the said interest.

[47] As provided for under s. 11 of the Civil Law Act 1956, interest is in the discretion of the trial judge. The discretion however, must be exercised judiciously in accordance with the
H rules. Order 42 r. 12 of the Rules of the High Court 1980 which was amended in June 2011, provides that every judgment sum shall carry interest at the rate of 4% per annum or at such other rate not exceeding the rate aforesaid as the court directs, such interest to be calculated from the date of judgment until the
I judgment is satisfied. Judgment in this case was given on 30 September 2011. Hence the interest rate applicable for the

period from the date of judgment until realisation should be 4%. We agree with learned counsel for the appellants that the learned Judicial Commissioner has erred in law in awarding interest at the rate of 8% on special damages from the date of judgment until full settlement. Similarly, the interest rate of 8% per annum on the general damages from the date of service of the writ until full settlement is not in accordance with O. 42 r. 12.

[48] We wish to add that a ground was raised in respect of the finding by the learned Judicial Commissioner that the hospital was vicariously liable for the negligence of Dr Jimmy Tang. As submitted by learned counsel for the hospital, this is not the pleaded case of the plaintiffs. In light of the arguments that were put before us, we find no necessity to consider this ground further.

[49] Based on all the above, both the appeals on liability are dismissed. The appeals on quantum are allowed to the extent that the multiplier for future damages is varied to 40 years and the total amount allowed is reduced by 30%. The interest rate is varied to 4% per annum. We make no order as to costs. The deposit is to be refunded to the appellants.